

DOCKET FILE COPY ORIGINAL

ORIGINAL

BEFORE THE

Federal Communications Commission

RECEIVED

WASHINGTON, D.C.

FEB - 1 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In re Applications of)	MM Docket No. <u>92-309</u>
)	
LOCAL TELEVISION)	File No. BPCT-911106KF
ASSOCIATES, INC.)	
)	
CHARLES FITZGERALD)	File No. BPCT-920114KF
)	
WEBBER/MOORE BROADCASTING)	File No. BPCT-920114KG
COMPANY LIMITED PARTNERSHIP)	
)	
For Construction Permit for a)	
New Commercial Television)	
Station on Channel 35 at)	
Jacksonville, North Carolina)	

To: The Honorable Joseph Chachkin
Administrative Law Judge

JOINT MOTION FOR APPROVAL OF SETTLEMENT

Local Television Associates, Inc. ("LTA"), Charles Fitzgerald, and Webber/Moore Broadcasting Company, Limited Partnership ("Webber/Moore"), by their attorneys, hereby petition for approval of the attached Settlement Agreements. As set forth herein, the agreements will result in a universal settlement of this proceeding, thereby expediting service to the public and saving Commission resources.

1. The parties respectfully request that the Presiding Judge take the following actions:

No. of Copies rec'd
List A B C D E

046

- a. Approve the attached Settlement Agreements between LTA and Fitzgerald and between LTA and Webber/Moore.
- b. Dismiss the Webber/Moore and Fitzgerald applications with prejudice.
- c. Grant the LTA application, as amended, substituting a new North Carolina corporation for LTA as the applicant, and adding Mr. Fitzgerald as one of the new corporation's shareholders and directors.
- d. Approve other changes to the LTA application, as specified in a Petition for Leave to Amend filed simultaneously with this Joint Petition.

The parties request that these actions all be taken simultaneously, as the Settlements are both contingent on these actions all taking place.

2. Attached hereto, as Exhibit A, is an agreement between LTA and Webber/Moore. This agreement provides for dismissal with prejudice of the Webber/Moore application in return for monetary payment reimbursing Webber/Moore for a portion of its expenses incurred in connection with this application, as permitted by FCC rules. The agreement is executed by both parties, and its effectiveness is expressly conditioned upon prior FCC approval, and upon approval of the other matters as set forth in paragraph 1 above. Exhibit B hereto is a declaration of a principal of Webber/Moore providing the certifications required by Section 73.3525 of the Commission's Rules, as well as setting out the expenses incurred by the applicant in the preparation, filing, and prosecution of its application.

3. Exhibit C hereto is an agreement between LTA and Mr. Fitzgerald. This agreement provides for a merger of interests in which Mr. Fitzgerald will acquire a 25 percent interest in new a corporation which will receive the Jacksonville construction permit. The other 75 percent will be owned by the LTA shareholders, pro rata. The agreement sets forth that Mr. Fitzgerald will be fully responsible for one quarter of all payments due in the prosecution of the new corporation's application, and in the construction of the television station. Thus, as this is a bona fide merger, it is properly approved under the Commission rules. A Petition for Leave to Amend, setting forward the merger proposal in greater detail, is being filed simultaneously with this Joint Petition.

4. Exhibit D hereto is a declaration of Mr. Fitzgerald, setting forth his certifications, as required by the Commission's rules. Exhibit E to this filing is a declaration of John Gainey, III, the President of LTA, also setting forth the certifications required of LTA pursuant to the Commission's rules.

5. Approval of this agreement will be in the public interest, as it will simplify the hearing process and eliminate unnecessary litigation -- conserving the resources of both the parties and the Commission. It will also allow for the initiation of a first commercial television service to Jacksonville, North Carolina in the only economically feasible manner. Therefore, this agreement should be approved.

For all the above reasons, the joint parties respectfully request that the Commission approve the Settlement Agreement, dismiss with prejudice the applications of Fitzgerald and Webber/Moore, grant the amended application of LTA, and approve the other amendments to the LTA application.

Respectfully submitted,

LOCAL TELEVISION
ASSOCIATES, INC.

FISHER, WAYLAND, COOPER
AND LEADER
1255 23rd Street, N.W.
Suite 800
Washington, D.C. 20037
(202) 659-3494

By: 

David D. Oxenford
Gregory L. Masters

CHARLES FITZGERALD

PEPPER & CORAZZINI
1776 K Street, N.W.
Suite 200
Washington, D.C. 20006
(202) 296-0600

By: 

Gregg P. Skall
Louise Cybulski

WEBBER/MOORE BROADCASTING
COMPANY LIMITED PARTNERSHIP

REDDY, BEGLEY & MARTIN
1001 22nd Street, N.W.
Suite 350
Washington, D.C. 20037
(202) 659-5700

By: 

Dennis Begley

Their Attorneys

Dated: February 1, 1993

Exhibit A

**Settlement Agreement
Between Local Television Associates and
Webber/Moore Broadcasting Company Limited Partnership**

SETTLEMENT AGREEMENT

This Settlement Agreement ("Agreement") is made this 29th day of January, 1993, by and between LOCAL TELEVISION ASSOCIATES, INC. ("LTA") and WEBBER/MOORE BROADCASTING COMPANY LIMITED PARTNERSHIP ("Settling Party"), (collectively, the "Parties").

WHEREAS, LTA has applied to the Federal Communications Commission (the "Commission") for authority to construct a new UHF television station (the "Station") on Channel 35 at Jacksonville, North Carolina (FCC File No. BPCT-911106KF, the "LTA Application"); and

WHEREAS, Settling Party has applied to the Commission for authority to construct facilities on the same channel (FCC File No. BPCT-920114KG, the "Settling Party Application"); and

WHEREAS, the Parties' applications are mutually exclusive with each other, and with the application of Charles Fitzgerald for the same facilities (FCC File No. BPCT-920114KG, "the Fitzgerald application") and have been designated for comparative hearing in MM Docket No. 92-309, to determine which application should be granted; and

WHEREAS, a Settlement between LTA and Fitzgerald has been reached by which Fitzgerald will be dismissing his application; and

WHEREAS, the Parties wish to avoid further costly and lengthy proceedings before the Commission and possibly the courts, as well as the burden that such proceedings impose upon the Commission's and the courts' staffs and resources; and

-2-

WHEREAS, the Parties believe that this Agreement will be in the public interest in that it will resolve the pending proceeding before the Commission, and thereby permit the more prompt initiation of a new UHF television service to the community of Jacksonville, North Carolina; and

WHEREAS, the obligations of the Parties hereunder are subject to the prior approval of the Commission and the conditions herein;

NOW, THEREFORE, in consideration of the mutual promises herein contained, the Parties agree as follows:

1. The Parties will file a joint petition ("Joint Petition") with the Commission pursuant to Section 73.3525 of the Commission's Rules on or before February 1, 1993 which requests that the Presiding Administrative Law Judge:

- (a) approve this Agreement; and
- (b) dismiss the Settling Party Application with prejudice; and
- (c) approve the agreement between Fitzgerald and LTA; and
- (d) dismiss the Fitzgerald application with prejudice; and
- (e) grant the application of LTA, as that application may be amended.

The Parties shall file with the Joint Petition a copy of this Agreement together with all supporting documentation required by Section 73.3525 of the Commission's Rules, including a declaration in the form of Exhibit A hereto.

-3-

2. LTA agrees to pay to Reddy, Begley & Martin, as attorneys for Settling Party, by certified or cashier's check or by wire transfer, as consideration for the foregoing and for the performance of the obligations of Settling Party hereunder, the total amount of TWELVE THOUSAND DOLLARS (\$12,000), or such lesser amount as may be approved by the Presiding Judge as being the documented bona fide expenses Settling Party has incurred directly in connection with the preparation, filing and prosecution of its application ("Settlement Sum"). The parties agree to accept the determination of the Presiding Judge of the amount of reasonable expenses as being conclusive. Settling Party has the burden of proving the reasonableness of its expenses. Payment shall be made within ten (10) business days following the date on which an order or opinion of the Commission granting the LTA application becomes a "Final Order." For purposes of this Agreement, a "Final Order" is an order that is no longer subject to administrative or judicial reconsideration, review, appeal or stay under applicable statutes and regulations. The Parties agree that, in the absence of any appeal or request for review, an order of the Presiding Administrative Law Judge approving this agreement shall become final forty (40) days after the release date shown on that order. The Settlement Sum shall be placed into an escrow account within fifteen (15) days of the execution of this Agreement. This escrow deposit will be held according to the terms of the Escrow Agreement attached hereto as exhibit A. The escrow deposit shall be released to Settling Party at the time the Settlement Sum is due, as set forth above.

-4-

3. No payments, other than the Settlement Sum specified in Paragraph 2, shall be made to Settling Party, and such sum shall be due only upon the tenth (10th) business day following finality of a grant of the LTA application.

4. Recognizing that this Agreement is expressly subject to the prior consent of the Commission and the need for Commission approval prior to its consummation, LTA and Settling Party shall cooperate with each other and with the Commission by expeditiously providing to each other or to the Commission, or both, all additional information that may be necessary or appropriate to comply with Section 73.3525 of the Commission's Rules. The Parties agree to provide the Commission in a timely manner with such information as it reasonably requests. The Parties further agree to use their best efforts in the preparation and filing of all Commission applications and related documents that may be necessary or appropriate to reach the result contemplated by Paragraph 1 of this Agreement. Each party shall bear its own expenses for the preparation of this Agreement and all supporting documents.

5. The obligations of the Parties are expressly conditioned upon Commission approval of this Settlement Agreement dismissing the Settling Party's application with prejudice, and upon such action becoming a Final Order within the meaning of Paragraph 3. In the event these actions do not become a Final Order within one hundred eighty (180) days from the date of submission of this Settlement Agreement and the Joint Petition, either party may, at its option, terminate this Agreement, and in

-5-

that event the proceeding will be restored to its prior status. The parties recognize that LTA will be amending its application, and that approval of the LTA application, as amended, is a condition precedent to the Parties' obligations under this Agreement.

6. This Agreement is the only agreement between the Parties hereto and contains all of the terms and conditions agreed upon with respect to the subject matter hereof and cannot be amended or modified except by an instrument in writing signed by the Parties. This Agreement shall be binding upon and inure to the benefit of the Parties, their successors, and assigns. Each party warrants to the other that it has full power and authority to enter into this Agreement, and to perform its obligations hereunder. The Parties further represent and warrant that they are not under any restrictions, contractual or otherwise, which prevent or preclude them from entering into this Agreement and from carrying out their obligations hereunder.

7. The Parties agree that this Agreement may be executed in counterparts, all of which together shall constitute one and the same instrument.

8. This Agreement shall be construed under the laws of the State of North Carolina.

9. The Settling Party acknowledges that specific performance shall be an appropriate remedy for its breach of this Agreement in addition to other legal or equitable remedies available under this Agreement or under the laws of the State of North Carolina.

-6-

10. A notice, request, statement or other communication to be given hereunder will be in writing and will be sent by first-class mail, postage prepaid to the party as follows:

If to LTA:

John W. Gainey, III
P.O. Drawer 2000
Morehead City, North Carolina 28557

With a copy to:

David D. Oxenford, Esq.
Fisher, Wayland, Cooper
and Leader
1255 23rd Street, N.W.
Suite 800
Washington, D.C. 20037

If to Settling Party:

Spurgeon W. Webber, III
224 N. Poplar Street, #1
Charlotte, NC 28202

With a copy to:

Dennis F. Begley, Esq.
Reddy, Begley & Martin
1001 22nd Street, N.W.
Suite 350
Washington, D.C. 20037

or to such other address or to such other person as either party may designate by notice given in writing. Any notice, request, statement, or other communication will be deemed to have been given three days after it was mailed.

IN WITNESS WHEREOF, the Parties have affixed their signatures to this Agreement on the date(s) indicated below.

LOCAL TELEVISION ASSOCIATES, INC.


John W. Gainey, III
President

Date: January 29, 1993

WEBBER/MOORE BROADCASTING LIMITED
PARTNERSHIP

Spurgeon W. Webber, III
General Partner

Date: January __, 1993

01/30/93

12:37

TEL NO.

Jan 30,93 12:37 P.01

01/29/93 17:44 REDDY BEGLEY MARTIN + 17043997566PPP523

NO.628 P001

01/29/93 15:29
SENT BY: FISHER, WAYLAND

2022966518
: 1-28-93 : 3:28PM :

202 296 6518-

2020505711: # 8/15

-7-

IN WITNESS WHEREOF, the Parties have affixed their signatures to this Agreement on the date(s) indicated below.

LOCAL TELEVISION ASSOCIATES, INC.

John W. Galney, III
President

Date: January __, 1993

WEBBER/MOORE BROADCASTING LIMITED
PARTNERSHIP

Spurgeon W. Webber, III
General Partner

Date: January 29, 1993

7834-001.A1

ESCROW AGREEMENT

This Escrow Agreement ("Escrow Agreement") is made this 29th day of January, 1993, by and among WEBBER/MOORE BROADCASTING COMPANY LIMITED PARTNERSHIP ("Webber/Moore"), LOCAL TELEVISION ASSOCIATES, INC. ("LTA"), and FIRST LIBERTY NATIONAL BANK as Escrow Agent ("Escrow Agent").

WHEREAS, LTA filed an application (the "LTA Application") with the Federal Communications Commission (the "Commission") requesting authority to construct a new UHF television station (the "Station") on Channel 35 at Jacksonville, North Carolina; and

WHEREAS, Webber/Moore filed an application (the "Webber/Moore Application") with the Commission requesting authority to construct similar facilities;

WHEREAS, LTA and Webber/Moore have entered into a definitive Settlement Agreement dated January __, 1993, whereby LTA agrees to pay Webber/Moore consideration for the dismissal of the Webber/Moore Application; and

WHEREAS, the Settlement Agreement provides for the execution and delivery of this Escrow Agreement for the purpose of Escrow Agent holding the settlement sum that is to be paid by LTA in accordance with the Settlement Agreement;

NOW, THEREFORE, in consideration of the above premises and covenants and agreements contained herein, the parties intending to be legally bound, hereby agree as follows:

-2-

1. Within fifteen (15) days following the date of the execution of this Agreement, LTA shall forward to Escrow Agent the sum of TWELVE THOUSAND DOLLARS (\$12,000.00) ("The Escrow Deposit") which shall be deposited at First Liberty National Bank in a Federally insured interest bearing account. The Escrow Agent shall provide a statement of deposit to LTA and Webber/Moore of the deposit of the funds into the escrow account.

2. The Escrow Agent shall hold the Escrow Deposit and accrued interest thereon and distribute it as follows:

(a) The Escrow Agent shall hold said Escrow Deposit until such time that an Order of the Commission dismissing the Webber/Moore Application becomes a Final Order, i.e. one no longer subject to administrative or judicial review, reconsideration, stay or appeal.

(b) Upon the tenth (10th) business days after the Final Order, Escrow Agent shall cause the delivery of the Settlement Sum, as defined in subsection (c) of this paragraph, by certified or cashier's check payable to Reddy, Begley & Martin, as attorneys for Webber/Moore, or by wire transfer of funds to a bank account designated by Reddy, Begley & Martin, and shall pay all other funds remaining in the Escrow Account thereafter to LTA.

(c) The Settlement Sum shall be the total amount of Webber/Moore's legitimate and reasonable expenses incurred in connection with the preparation, filing, and prosecution of the

-3-

Webber/Moore Application, including expenses incurred in the settlement of this proceeding, as approved by the Commission.

(d) In the event that the Order dismissing the Webber/Moore Application has not become final within one hundred and eighty (180) days of the date of the submission of the Settlement Agreement, if either party to the Settlement Agreement elects to terminate that agreement pursuant to paragraph 5 of the Settlement Agreement, the Escrow Agent shall return the Escrow Deposit together with interest accrued thereon to LTA, and this Escrow Agreement shall be null and void. In the event this Escrow Agreement becomes null and void pursuant to the terms of this paragraph, all parties shall revert in all respects, as to the subject matters hereof, to the status quo ante the date of execution of this Escrow Agreement.

3. If a controversy arises between the parties hereto, the Escrow Agent shall not be required to resolve such controversy or take any action, but shall await final resolution of the controversy by joint written instruments from the parties or by appropriate legal proceedings before delivering the Escrow Sum to either party. In the event of a controversy or dispute, the Escrow Agent may interplead the Escrow Funds into the registry of the Superior Court of the District of Columbia, and be absolved of any further responsibility with respect to such funds.

4. This Escrow Agreement is ancillary to, and is to be interpreted in accordance with, the Settlement Agreement. All capitalized terms in this Escrow Agreement, which are not

-4-

otherwise defined in this Escrow Agreement, shall have the same definitions as in the Settlement Agreement. Any ambiguities in this Escrow Agreement are to be resolved, whenever possible, by reference to the Settlement Agreement. To the extent, if any, that the provisions of this Escrow Agreement conflict with the terms in the Settlement Agreement, the terms of the Settlement Agreement shall govern.

5. The Escrow Agent is not party to nor bound by any other agreement between LTA and Webber/Moore. The Escrow Agent shall act as depositor only, and is not responsible for the genuineness, sufficiency, correctness or validity of any instrument deposited with it, or for the form or execution of such instrument or for the identity, authority or rights of any person's execution. LTA and Webber/Moore jointly and severally agree to indemnify and hold the Escrow Agent harmless from and against all costs, charges, damages, and attorneys' fees which Escrow Agent in good faith may incur or suffer in connection with any action arising out of this Escrow Agreement.

6. The Escrow Agent shall have no duties other than those expressly imposed on it herein and shall not be liable for any act which it may do or omit to do while acting in good faith and in the exercise of her judgment, or for any other action which it may do or refrain from doing in connection herewith except for willful misconduct. The Escrow Agent may, if in its judgment it believes it necessary, rely on the advice of counsel. Any act

-5-

done or omitted by Escrow Agent on advice of counsel shall be conclusive evidence of such good faith.

7. The Escrow Agent shall charge its normal and customary amount for the opening of this account, and for the check or wire transfer upon distribution of the funds from this account. In addition, the Escrow Agent shall charge a fee of Twenty Five Dollars (\$25.00) for acting as Escrow Agent. If any extraordinary or unusual additional services are to be performed by Escrow Agent, it shall first notify LTA and Webber/Moore of its plans to undertake such services, and, if neither party objects, Escrow Agent shall be entitled to reasonable compensation for such activities. All charges of Escrow Agent shall be equally split between LTA and Webber/Moore, to be subtracted from the distributions made prior to paragraph 2 hereof.

8. In the event of the resignation of the Escrow Agent, or upon the termination of its business existence, or for any other reason upon the joint concurrence of LTA and Webber/Moore, the Escrow Agent may be replaced. In such event, LTA and Webber/Moore will jointly notify Escrow Agent in writing of the decision to make such replacement. The Escrow Agent or its successor shall promptly transfer the Escrow Deposit to the successor Escrow Agent agreed to by LTA and Webber/Moore.

9. All notices, demands and requests required or permitted to be given under the terms of this Escrow Agreement shall be given in writing, as follows:

-6-

If to LTA:

John W. Gainey, III
P.O. Drawer 2000
Morehead City, North Carolina 28557

With a copy to:

David D. Oxenford, Esq.
Fisher, Wayland, Cooper
and Leader
1255 23rd Street, N.W.
Suite 800
Washington, D.C. 20037

If to Webber/Moore:

Spurgeon W. Webber
224 N. Poplar Street, #1
Charlotte, North Carolina 28202

With a copy to:

Dennis F. Begley, Esq.
Reddy, Begley & Martin
1001 22nd St., N.W.
Suite 350
Washington, D.C. 20037

If to Escrow Agent:

First Liberty National Bank
1146 19th St., N.W.
Washington, D.C. 20036
Attn: William Gallagher

10. This Escrow Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective successors and assigns.

11. This Escrow Agreement shall be construed under the laws of the District of Columbia.

12. This Escrow Agreement may be executed in one or more counterparts, each of which will be deemed to be an original but

-7-

all of which together will constitute one and the same instrument.

IN WITNESS WHEREOF, the parties hereto executed or have caused this Escrow Agreement to be executed as of the day and year first above written.


LOCAL TELEVISION ASSOCIATES, INC.

By


John V. Gainey, III
President

WEBBER/MOORE BROADCASTING
LIMITED PARTNERSHIP

By


Spurgeon W. Webber, III
General Partner

FIRST LIBERTY NATIONAL BANK

By:


William Gallagher
Executive Vice President

01/28/93 15:32
SENT BY: FISHER, WAYLAND2022966518
; 1-28-93 ; 8:02PM ;

202 286 6518-

2026585711:#15/15

-7-

all of which together will constitute one and the same instrument.

IN WITNESS WHEREOF, the parties hereto executed or have caused this Escrow Agreement to be executed as of the day and year first above written.

LOCAL TELEVISION ASSOCIATES, INC.

By _____
John W. Gainey, III
President

WEBBER/MOORE BROADCASTING
LIMITED PARTNERSHIP

By _____
Spurgeon W. Webber, III
General Partner

FIRST LIBERTY NATIONAL BANK

By: _____
William Gallagher
Executive Vice President

Exhibit B

Declaration of Spurgeon W. Webber, III
(Facsimile Signature -- Original to Follow by Supplement)

DECLARATION

Spurgeon W. Webber, III, hereby declares under penalty of perjury that the following is true and correct:

1. I am a general partner of Webber/Moore Broadcasting Company Limited Partnership ("Webber/Moore"), an applicant for a construction permit for a new UHF television broadcast station at Jacksonville, North Carolina (File No. BPCT-920114KG). The application was prepared under my direction.

2. Webber/Moore has entered into a settlement agreement with Local Television Associates, Inc. ("LTA"). The application of Webber/Moore was not filed for purposes of reaching a settlement. However, after the application was filed, we reviewed the prospects for the operation of a new UHF television station in that market. From our review, we have concluded that the construction of a new stand-alone television station in the market is not economically justified. Thus, we have agreed to dismiss our application in exchange for reimbursement of a portion of our expenses.

3. Webber/Moore considers the agreement to be in the public interest because it will facilitate a resolution of the mutual exclusivity between the LTA and Webber/Moore applications, thereby simplifying the Commission proceeding. Thus, this agreement conserves the resources of the Commission and expedites the initiation of a first UHF television station in Jacksonville, North Carolina.

4. Webber/Moore certifies:

(a) That it did not file its application for a construction permit for the purpose of reaching or carrying out this agreement or any other settlement.

2.

(b) That, except as set forth in the agreement, it has neither paid, promised, been promised nor received any consideration in connection with the settlement.

5. In connection with the prosecution of its application, Webber/Moore incurred the following legitimate and prudent expenses:

<u>Expense</u>	<u>Amount</u>
Legal fees (Reddy, Begley & Martin) (See Attachment A)	\$ 6,604.88
Engineering fees (Cohen, Dupell & Everest) (See Attachment B)	\$ 4,059.27
FCC filing fee (See Attachment C-stamped-in Fee Form)	\$ 2,535.00
Postage	\$ 87.00
Paper supplies	\$ 75.00
Banking fees	\$ 50.00
Computer checks	\$ 100.00
Travel expenses (5180 miles x .285/mi)	\$ 1,476.30
Phone	\$ 35.00
<u>Total:</u>	\$15,022.45

01/30/93


12:38

TEL NO.

Jan 30, 93 12:37 P.02

3.

Dated this 29th day of January, 1993.


Spurgeon W. Webber, II